

2012 WL 1466123 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

Max MILLER, Jr., Appellant,
IN THE MATTER OF THE ESTATE OF INGRAM MILLER, Deceased, Appellee.

No. 11-107134-A.
April 4, 2012.

Appeal from the District Court of Harvey County, Kansas
The Honorable William Lyle
District Court Case No. 09 PR 98

Brief of Appellant

Mark G. Ayesh, #10175, Ray E. Simmons, #12296, Ayesh Law Offices, 8100 E. 22nd St. North, Building 2300, Suite 2, Wichita, Kansas 67226, Telephone: (316) 682-7381, Fax: (316) 682-1729, Attorneys for Appellant.

***i TABLE OF CONTENTS**

I. NATURE OF CASE	1
II. ISSUES	2
A. DID THE DISTRICT COURT ERR IN FINDING THAT JACQUELINE ATHERSTONE DID NOT EXERT UNDUE INFLUENCE UPON THE DECEDENT WHEN THE EVIDENCE REVEALED THAT ATHERSTONE UPON HER RETURN FROM CALIFORNIA IN SEPTEMBER 2009 (I) WAS IN DESPERATE NEED OF MONEY AND DEMANDED MONEY FROM DR. MILLER; (II) THREATENED DR. MILLER WITH HIS LIFE ON A REGULAR BASIS; (III) ACCOMPANIED DR. MILLER TO HIS LAWYER'S OFFICE TO GET THE WILL CHANGED; (IV) PARTICIPATED IN THE DRAFTING OF THE LAST WILL AND TESTAMENT; AND (V) ATTEMPTED TO SEQUESTER THE DECEDENT FROM HIS FRIENDS?	2
B. DID THE DISTRICT COURT ERR IN CONCLUDING THAT THE RELATIONSHIP BETWEEN DR. INGRAM MILLER AND JACQUELINE ATHERSTONE WAS NOT A CONFIDENTIAL RELATIONSHIP WHEN EVIDENCE REVEALED THAT (I) THE DECEDENT AND ATHERSTONE LIVED AS ONE WITH REGARD TO THEIR MONEY; (II) ATHERSTONE HAD A KEY TO HIS HOUSE; (III) ATHERSTONE TELEPHONED THE DECEDENT VIRTUALLY EVERY DAY; (IV) ATHERSTONE RECOMMENDED PHARMACEUTICALS FOR THE DECEDENT; (V) ATHERSTONE ACCOMPANIED THE DECEDENT TO HIS DOCTOR'S APPOINTMENTS; (VI) THE DECEDENT BOUGHT VEHICLES FOR ATHERSTONE; (VII) ATHERSTONE KEPT RECEIPTS IN A FINANCIAL LEDGER ON THE EXPENDITURES OF THE DECEDENT AND ATHERSTONE; AND (VIII) ATHERSTONE TOLD THE DECEDENT THAT SHE LOVED HIM WAS GOING TO MOVE IN WITH HIM AND WAS GOING TO MARRY HIM?	3
C. DID THE DISTRICT COURT ERR IN CONCLUDING THAT THE DECEDENT HAD INDEPENDENT ADVICE FROM PERSONS OTHER THAN JACQUELINE ATHERSTONE IN THE PREPARATION OF HIS LAST WILL AND TESTAMENT WHEN *ii THE EVIDENCE REVEALED THAT THE DECEDENT'S LAWYER, WILLIAM BROWN, (I) ALLOWED JACQUELINE ATHERSTONE TO PARTICIPATE IN THE DRAFTING OF THE WILL AND DICTATE CERTAIN TERMS AND CONDITIONS TO BE INCLUDED IN THE WILL; (II) SENT THE DECEDENT FOR A MENTAL EVALUATION SOME 30 DAYS AFTER THE EXECUTION OF THE LAST WILL AND TESTAMENT; (III) KNEW AT THE MENTAL EVALUATION THE DECEDENT WAS CONFUSED, DID NOT KNOW HIS FAMILY, AND THOUGHT HE WAS THERE TO CHANGE HIS WILL AGAIN; (IV) WAS TOLD BY ATHERSTONE THE CONCOCTED STORY ABOUT THE DAUGHTER OF THE SIGNIFICANT OTHER BEING ABDUCTED, RAPED, BURIED ALIVE AND/OR DISMEMBERED; (V) AT ONE TIME REPRESENTED BOTH JACQUELINE ATHERSTONE AND THE DECEDENT; AND (VI) DID NOTHING TO DETERMINE WHETHER	3

OR NOT THE DECEDENT WAS BEING SUBJECTED TO UNDUE INFLUENCE BY JACQUELINE ATHERSTONE?	
D. DID THE DISTRICT COURT ERR IN DISCOUNTING THE DIARY OF THE DECEDENT AS MERELY JOTTING DOWN THE "PROS AND CONS" OF HIS RELATIONSHIP WITH ATHERSTONE WHEN THE DIARY IN THE DECEDENT' S OWN HANDWRITING REFLECTS THAT (I) THE DECEDENT HAD BEEN DUPED BY ATHERSTONE; (II) IT WAS TIME FOR THE DECEDENT TO RUN; (III) IF ATHERSTONE WAS NOT GOING TO MOVE IN WITH THE DECEDENT THE DECEDENT WAS GOING TO ASSISTED LIVING; (IV) ATHERSTONE WAS AN HABITUAL LIAR AND HAD A SECRET LIFE IN CALIFORNIA; (V) ATHERSTONE'S STORIES STUNK; AND (VI) ATHERSTONE HAD ANOTHER MAN IN CALIFORNIA?	3
III. FACTUAL STATEMENT	4
A. FAMILY & WITNESSES	4
B. JACQUELINE ATHERSTONE	7
C. VERACITY OF JACQUELINE ATHERSTONE	10
D. DR. INGRAM MILLER AND JACQUELINE ATHERSTONE AFTER JOYCE MILLER' S DEATH IN AUGUST 2007 AND PRIOR TO SEPTEMBER 1, 2009	14
*iii E. SEPTEMBER 1, 2009 TO NOVEMBER 1, 2009 (DOD)	17
F. THE LAST WILL AND TESTAMENT	22
G. DR. KATHY PEARCE	27
H. THE LAST THREE DAYS	30
I. THE SPIRAL NOTEBOOK SUMMER OF 2009 TO DATE OF DEATH	34
IV. ARGUMENT AND AUTHORITY	38
A. Did the district court err in finding that Jacqueline Atherstone did not exert undue influence upon the decedent when the evidence revealed that Atherstone upon her return from California in September 2009 (i) was in desperate need of money and demanded money from Dr. Miller; (ii) threatened Dr. Miller with his life on a regular basis; (iii) accompanied Dr. Miller to his lawyer' s office to get the will changed; (iv) participated in the drafting of the Last Will and Testament; and (v) attempted to sequester the decedent from his friends?	38
1. Standard of Review	38
U.S.D. No. 233 v. Kansas Ass 'n of American Educators, 275 Kan. 313, 64 P.3d 372 (2003)	38
City of Wichita v. Public Employees Relations Board, 259 Kan. 628, 913 P.2d 137 (1996)	38
2. Trial Court	38
3. Law and Argument	38
Estate of Owen R. Robinson v. R. Michael Jennings, 231 Kan. 300, 644 P.2d 420 (1982)	38
In Re: Estate of Carothers, 220 Kan. 437, 552 P.2d 1354 (1976)	39
Linn v. Blanton, 111 Kan. 743, 208 Pac. 616 (1922)	39
*iv Nelson Administrator v. Dague, 194 Kan. 195, 398 P.2d 268 (1965)	39
In the Matter of the Estate Lucille S. Bennett, 19 Kan. App.2d 154, 865 P.2d 1062 (1993)	39
In Re: Estate of Raymond E. Logan v. Bobby Logan and Margie S. Logan, 23 Kan. App.2d 920, 937 P.2d 967 (1997)	39
Estate of L. W. Werth v. Emil Werth and Victoria Werth, 207 Kan. 137, 483 P.2d 1053 (1971)	40
Proverbs 7:21-23(NLT)	42
B. Did the district court err in concluding that the relationship between Dr. Ingram Miller and Jacqueline Atherstone was not a confidential relationship when evidence revealed that (i) the decedent and Atherstone lived as one with regard to their money; (ii) Atherstone had a key to his house; (iii) Atherstone telephoned the decedent virtually every day; (iv) Atherstone recommended pharmaceuticals for the decedent; (v) Atherstone accompanied the decedent to his doctor's appointments; (vi) the decedent bought vehicles for Atherstone; (vii) Atherstone kept receipts in a financial ledger on the expenditures of the decedent and Atherstone; and (viii) Atherstone told the decedent that she loved him was going to move in with him and was going to marry him?	42
1. Standard of Review	43
U.S.D. No. 233 v. Kansas Ass 'n of American Educators, 275 Kan. 313, 64 P.3d 372 (2003)	43
City of Wichita v. Public Employees Relations Board, 259 Kan. 628, 913 P.2d 137 (1996)	43
2. Trial Court	43
3. Law and Argument	43
Clark Estate, 461, Pa. 52, 334 A.2d 628 (1975)	44
Buttons Estate, 459 Pa. 234, 328 A.2d 480 (1974)	44

*v C. Did the district court err in concluding that the decedent had independent advice from persons other than Jacqueline Atherstone in the preparation of his Last Will and Testament when the evidence revealed that the decedent's lawyer, William Brown, (i) allowed Jacqueline Atherstone to participate in the drafting of the will and dictate certain terms and conditions to be included in the will; (ii) sent the decedent for a mental evaluation some 30 days after the execution of the Last Will and Testament; (iii) knew at the mental evaluation the decedent was confused, did not know his family, and thought he was there to change his will again; (iv) was told by Atherstone the concocted story about the daughter of the significant other being abducted, raped, buried alive and/or dismembered; (v) at one time represented both Jacqueline Atherstone and the decedent; and (vi) did nothing to determine whether or not the decedent was being subjected to undue influence by Jacqueline Atherstone?

1. Standard of Review	44
U.S.D. No. 233 v. Kansas Ass'n of American Educators, 275 Kan. 313, 64 P.3d 372 (2003)	45
City of Wichita v. Public Employees Relations Board, 259 Kan. 628, 913 P.2d 137 (1996)	45
2. Trial Court	45
3. Law and Argument	45
D. Did the district court err in discounting the diary of the decedent as merely jotting down the "pros and cons" of his relationship with Atherstone when the diary in the decedent's own handwriting reflects that (i) the decedent had been duped by Atherstone; (ii) it was time for the decedent to run; (iii) if Atherstone was not going to move in with the decedent the decedent was going to assisted living; (iv) Atherstone was an habitual liar and had a secret life in California; (v) Atherstone's stories stunk; and (vi) Atherstone had another man in California?	47
1. Standard of Review	47
U.S.D. No. 233 v. Kansas Ass'n of American Educators, 275 Kan. 313, 64 P.3d 372 (2003)	47
*vi City of Wichita v. Public Employees Relations Board, 259 Kan. 628, 913 P.2d 137 (1996)	47
2. Trial Court	47
3. Law and Argument	48
V. CONCLUSION	48

*1 I. NATURE OF CASE

This case concerns undue influence. The appellate is Max Miller, Jr., a nephew of the decedent. Max Miller, Jr. challenges the validity of the Last Will and Testament of his uncle, Dr. Inghram Miller, upon the grounds that Jacqueline Atherstone exerted undue influence upon the decedent resulting in the decedent changing his Will approximately thirty (30) days before his death. It is believed that Jacqueline Atherstone caused or contributed to the death of Dr. Inghram Miller. The Newton Police Department investigated the facts and circumstances surrounding the death of Dr. Inghram. There was not sufficient evidence to bring formal charges against Atherstone. Atherstone led Dr. Miller into believing that she was going to move in with him, take care of him, and ultimately marry him. Atherstone was a Lesbian, a fact that she concealed from Dr. Inghram Miller. Atherstone was in California for the most part of 2009. Dr. Miller's Last Will and Testament from 2007, which stood for two years, left the residence to Atherstone and the residue equally to two nieces and a nephew-Max Miller, Jr.

Atherstone returned from California on or about September 1, 2009 desperate for money ostensibly for a surgery bill. Upon her return she constantly threatened Inghram Miller with his life. She would spread stories about the daughter of her significant other living in California being brutally raped, dismembered and buried in Oklahoma. She regularly told Dr. Inghram Miller that she was going to have the "Judge" (a person in California) take him out or kill him. Upon Atherstone's return from California, Dr. Inghram Miller would sleep in his car parked at friends' residences. Prior to Atherstone's return from California Dr. Inghram Miller had bars put on the windows of his residence. Atherstone would accompany Dr. Miller to his lawyer's office to discuss changing the will to leave *2 everything to Atherstone. Atherstone participated in the drafting of the will. Atherstone dictated the contingent beneficiaries, which was a person that Dr. Miller had never met. Dr. Miller did not have any independent advice pertaining to the change of his will.

The decedent was scheduled for appointments on Monday, November 2, 2009, to move to assisted living. On Sunday, November 1, 2009, five of the decedent's friends saw him in the morning and Dr. Miller was fine. The decedent's home healthcare aide arrived at 10:00 a.m. Jacqueline Atherstone was present. The home healthcare aide left around 10:30 a.m. Within minutes of

her departure, Jacqueline Atherstone was calling 911 saying that Dr. Miller had suffered a [stroke](#) and/or [heart attack](#) and had collapsed. Jacqueline Atherstone did not follow the ambulance to the hospital. Between 11:00 a.m. and 7:00 p.m. on November 1, 2009, Atherstone made over 15 telephone calls and 75 text messages to her significant other in California. Dr. Miller died on the evening of November 1, 2009. The autopsy report said the cause of death was a blunt force [subdural hematoma](#). Atherstone and counsel allege the [subdural hematoma](#) was spontaneous. Spontaneous [subdural hematomas](#) are extremely rare.

II. ISSUES

The following are the issues to be decided upon appeal.

A. DID THE DISTRICT COURT ERR IN FINDING THAT JACQUELINE ATHERSTONE DID NOT EXERT UNDUE INFLUENCE UPON THE DECEDENT WHEN THE EVIDENCE REVEALED THAT ATHERSTONE UPON HER RETURN FROM CALIFORNIA IN SEPTEMBER 2009 (I) WAS IN DESPERATE NEED OF MONEY AND DEMANDED MONEY FROM DR. MILLER; (II) THREATENED DR. MILLER WITH HIS LIFE ON A REGULAR BASIS; (III) ACCOMPANIED DR. MILLER TO HIS LAWYER'S OFFICE TO GET THE WILL CHANGED; (IV) PARTICIPATED IN THE DRAFTING OF THE LAST WILL AND TESTAMENT; AND (V) ATTEMPTED TO SEQUESTER THE DECEDENT FROM HIS FRIENDS?

*3 B. DID THE DISTRICT COURT ERR IN CONCLUDING THAT THE RELATIONSHIP BETWEEN DR. INGRAM MILLER AND JACQUELINE ATHERSTONE WAS NOT A CONFIDENTIAL RELATIONSHIP WHEN EVIDENCE REVEALED THAT (I) THE DECEDENT AND ATHERSTONE LIVED AS ONE WITH REGARD TO THEIR MONEY; (II) ATHERSTONE HAD A KEY TO HIS HOUSE; (III) ATHERSTONE TELEPHONED THE DECEDENT VIRTUALLY EVERY DAY; (IV) ATHERSTONE RECOMMENDED PHARMACEUTICALS FOR THE DECEDENT; (V) ATHERSTONE ACCOMPANIED THE DECEDENT TO HIS DOCTOR'S APPOINTMENTS; (VI) THE DECEDENT BOUGHT VEHICLES FOR ATHERSTONE; (VII) ATHERSTONE KEPT RECEIPTS IN A **FINANCIAL** LEDGER ON THE EXPENDITURES OF THE DECEDENT AND ATHERSTONE; AND (VIII) ATHERSTONE TOLD THE DECEDENT THAT SHE LOVED HIM WAS GOING TO MOVE IN WITH HIM AND WAS GOING TO MARRY HIM?

C. DID THE DISTRICT COURT ERR IN CONCLUDING THAT THE DECEDENT HAD INDEPENDENT ADVICE FROM PERSONS OTHER THAN JACQUELINE ATHERSTONE IN THE PREPARATION OF HIS LAST WILL AND TESTAMENT WHEN THE EVIDENCE REVEALED THAT THE DECEDENT'S LAWYER, WILLIAM BROWN, (I) ALLOWED JACQUELINE ATHERSTONE TO PARTICIPATE IN THE DRAFTING OF THE WILL AND DICTATE CERTAIN TERMS AND CONDITIONS TO BE INCLUDED IN THE WILL; (II) SENT THE DECEDENT FOR A MENTAL EVALUATION SOME 30 DAYS AFTER THE EXECUTION OF THE LAST WILL AND TESTAMENT; (III) KNEW AT THE MENTAL EVALUATION THE DECEDENT WAS CONFUSED, DID NOT KNOW HIS FAMILY, AND THOUGHT HE WAS THERE TO CHANGE HIS WILL AGAIN; (IV) WAS TOLD BY ATHERSTONE THE CONCOCTED STORY ABOUT THE DAUGHTER OF THE SIGNIFICANT OTHER BEING ABDUCTED, RAPED, BURIED ALIVE AND/OR DISMEMBERED; (V) AT ONE TIME REPRESENTED BOTH JACQUELINE ATHERSTONE AND THE DECEDENT; AND (VI) DID NOTHING TO DETERMINE WHETHER OR NOT THE DECEDENT WAS BEING SUBJECTED TO UNDUE INFLUENCE BY JACQUELINE ATHERSTONE?

D. DID THE DISTRICT COURT ERR IN DISCOUNTING THE DIARY OF THE DECEDENT AS MERELY JOTTING DOWN THE "PROS AND CONS" OF HIS RELATIONSHIP WITH ATHERSTONE WHEN THE DIARY IN THE DECEDENT'S OWN HANDWRITING REFLECTS THAT (I) THE DECEDENT HAD BEEN DUPED BY ATHERSTONE; (II) IT WAS TIME FOR THE DECEDENT TO RUN; (III) IF ATHERSTONE WAS NOT GOING TO MOVE IN WITH THE DECEDENT THE DECEDENT WAS GOING TO ASSISTED LIVING; (IV) ATHERSTONE *4 WAS AN HABITUAL LIAR AND HAD A SECRET LIFE IN CALIFORNIA; (V) ATHERSTONE'S STORIES STUNK; AND (VI) ATHERSTONE HAD ANOTHER MAN IN CALIFORNIA?

III. FACTUAL STATEMENT

A. FAMILY & WITNESSES

Max Miller, Jr., is the nephew of the decedent. His grandfather and grandmother were Glen and Jesse Miller. Test. of M. Miller, R. XI, Tr. Vol. I, p. 14, 11. 16-18. Glen and Jesse Miller had two children, Dr. Max I. Miller and Dr. Inghram Miller. Test. of M. Miller, R. XI, Tr. Vol. I, p. 14, 11. 19-22. Max I. Miller, the father of Max Miller, Jr. was an anesthesiologist in Kansas City, Kansas. Test. of M. Miller, R. XI, Tr. Vol. I, p. 14, 11. 23-24. Dr. Max Miller married Annabelle Miller and they had three children. Max Miller, Jr., Annette McLaughlin and Marilyn Pattison. Test. of M. Miller, R. XI, Tr. Vol. I, p. 15, 11. 4-14. Dr. Inghram Miller was married to Joyce Miller. They did not have any children. Test. of M. Miller, R. XI, Tr. Vol. I, p. 15, 11. 20-25.

Glen Spielman, Sr., is 73 years of age. His wife's name is Hazel. He has five children. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 233, 11. 1-15. Glen Spielman spent three years in the Army. He is now self-employed, on social security and doing some odd jobs. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 233, 11. 16-25. Glen Spielman first met Dr. Inghram Miller back in the 1950's. Prior to Joyce Miller's death in August 2007, Glen and Hazel Spielman would see Dr. Inghram Miller and Joyce Miller four to five times per week. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 234, 11. 1-14. After Joyce's death in August 2007, Glen Spielman and/or his wife would see Dr. Inghram Miller every day. Glen Spielman was the best friend of Dr. Inghram Miller. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 235, 11. 9-13.

*5 Hazel Spielman is the wife of Glen Spielman. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 112, 11. 9-22. Hazel Spielman has been a crossing guard for a school for the last 21 years. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 113, 11. 1-3. Hazel Spielman met Dr. Inghram Miller as a client of his dental practice along with her children. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 113, 11. 4-10. Hazel Spielman and her husband's contact with Dr. Inghram Miller increased after Dr. Miller broke his hip approximately one year before the date of his death. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 113, 11. 22-25; p. 114, 11. 1-3.

Mike Spangler is a farmer in Walton, Kansas, approximately seven miles from Newton. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 111, 11. 19-24. Prior to the death of Joyce Miller in August of 2007, Mike Spangler would see Dr. Inghram Miller and Joyce Miller once a year when he would take them a rent check for farm ground leased from them. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 112, 11. 12-17. After the death of Joyce Miller, the frequency of visits with Dr. Inghram Miller changed. Mike Spangler struck up a relationship with Dr. Inghram Miller where they would see each other three times a week. This frequency of contact with Dr. Inghram Miller continued until he died. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 112, 11. 18-25; p. 113, 11. 1-9.

Joan Orr is age 82 and lived catty-corner across from the residence of Dr. Inghram Miller when she was young. Joan Orr has known Dr. Inghram Miller since she was 6 years old. Test. of J. Orr, R. XI, Tr. Vol. I, p. 199, 11. 17-25; p. 201, 11. 1-10. Joan Orr graduated with a degree in psychology and social work from Oklahoma University and then got a masters at Kansas University. She worked for SRS as a Clinical Social Worker until her retirement. Test. of J. Orr, R. XI, Tr. Vol. I, p. 200, 11. 1-25. Joan Orr refers to her relationship with Dr. Inghram Miller as close as a brother and a very dear sweet friend. Joan *6 Orr was a very close friend to Joyce Miller. Joan Orr and Joyce Miller would talk in person or by telephone at least once a day. After Joyce's death in August 2007, Joan Orr would talk every two or three days to Inghram Miller. Test. of J. Orr, R. XI, Tr. Vol. I, p. 202, 11. 9-13; p. 203, 11. 14-20; p. 204, 11. 8-11.

William Brown is an attorney practicing in Newton since 1967. Test. of W. Brown, R. XI, Tr. Vol. II, p. 137, 11. 12-17. William Brown and his wife knew Dr. Inghram Miller and Joyce Miller for approximately 50 years. Test. of W. Brown, R. XI, Tr. Vol. II, p. 137, 11. 18-25; p. 138, 11. 1-5. William Brown was designated as the power of attorney for Dr. Inghram Miller on or about February of 2008. Test. of W. Brown, R. XI, Tr. Vol. II, p. 138, 11. 19-23.

Valerie Klaassen is a registered nurse working for Central Home Health Care. Test. of V. Klaassen, R. XI, Tr. Vol. II, p. 37, 11. 22-25; p. 38, 11. 1-2. Toward the end of October 2009, Central Home Health Care started assessing the situation of Dr. Inghram Miller. Test. of V. Klaassen, R. XI, Tr. Vol. II, p. 38, 11. 3-6.

Jacqueline Atherstone is the daughter of John Atherstone and Ruby Atherstone. The family came from South Africa to America in 1971. John Atherstone died in a plane crash in 1974. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 4, 11. 24-25; p. 5, 11. 1-19. Jacqueline Atherstone does not know if her father was piloting the plane that crashed causing his death. She did not know who was with him. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 8, 11. 5-8.

Ruby Atherstone, the mother of Jacqueline Atherstone, worked for Dr. Jody Galichia for approximately 16 years as a Patient Care Ambassador. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 14, 11. 9-17. When Joyce Miller was alive, Dr. Inghram Miller and Joyce would come to Wichita for appointments at the Galichia Medical Group several times a week. Dr. *7 Inghram Miller, Joyce Miller, Ruby Atherstone and Jacqueline Atherstone would go out and eat together. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 19, 11. 16-25; p. 20, 1. 1.

Dr. Kathy Pearce is a Clinical Psychologist with Prairie View Hospital in Newton. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 70, 11. 3-11. William Brown had arranged with Dr. Kathy Pearce to have a testamentary capacity evaluation of Dr. Inghram Miller. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 71, 1. 25; p. 72, 11. 1-7.

Nancy Blankley was the next door neighbor to Dr. Inghram and Joyce Miller since 1994. Test. of N. Blankley, R. XI, Tr. Vol. II, p. 98, 11. 16-20. Nancy Blankley would see Dr. Inghram Miller most everyday, except she didn't see him much toward the end of his life. Test. of N. Blankley, R. XI, Tr. Vol. II, p. 100, 11. 10-14. Nancy Blankley saw Joyce Miller maybe six times. Test. of N. Blankley, R. XI, Tr. Vol. II, p. 100, 11. 15-19.

Cindy Curfman is the girlfriend of Max Miller, Jr. Their relationship started at or about the time of Joyce Miller's death in August of 2007. Test. of M. Miller, R. XI, Tr. Vol. I, p. 16, 11. 14-19; p. 17, 11. 3-22.

B. JACQUELINE ATHERSTONE

Jacqueline Atherstone lived in Wichita, Kansas, for approximately ten years at 124 N. Bluff Street. She lived there with her mother and with her significant other Patti Stanislaus. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 5, 11. 22-25; p. 6, 11. 1-20. Atherstone testified that she was an only child. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 5, 11. 20-21. Atherstone testified that her mom had four boys that were deceased. She didn't know if they died in the same plane crash as her father. She stated she was too little but was told the four boys had passed. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 7, 11. 16-25; p. 8, 11. 1-4.

*8 At trial Atherstone testified that she graduated from Kapun Mt. Carmel in 1976. In her deposition, Atherstone testified she graduated in 1978. When asked how is it you can forget the year you graduated from high school, Atherstone testified "I don't know, I'm not very good at all with dates sir." Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 8, 11. 18-25; p. 9, 11. 1-9. At trial Atherstone stated she did not attend college. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 9, 11. 13-18. In her deposition, when asked the same question, she stated she went to Wits University in South Africa. At trial she admitted her deposition testimony was not true. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 9, 11. 17-25; p. 10, 11. 1-12. At trial Atherstone testified she did not go to any other colleges. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 10, 11. 13-14. In her deposition, Atherstone stated she attended Southern Methodist University for two and one-half years between 1979 and 1990. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 10, 11. 15-25; p. 11, 11. 1-21.

Jacqueline Atherstone told Dr. Inghram Miller that she was a physician's assistant. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 14, 11. 6-8. At trial Atherstone testified she was a physician's assistant because she helped doctors get things ready for patients but then admitted that she knows the difference between a Physician's Assistant, a formal title requiring one to go to school and get a certain degree. Test. of J. Atherstone, Tr. Vol. IV, p. 13, 11. 2-23. Max Miller first met Jacqueline Atherstone in 2007 after

Joyce Miller died. Dr. Inghram Miller, Ruby Atherstone, Jacqueline Atherstone, Max Miller, Jr. and Cindy Curfman had lunch together. Atherstone indicated to Max Miller, Jr. that she was a Physician's Assistant. This was not true. Test. of M. Miller, R. XI, Tr. Vol. I, p. 18,11.9-25; p. 19,11. 1-9.

***9** Atherstone also represented to Max Miller, Jr. and others that she was a Certified Public Accountant (CPA). The representation was false. Test. of M. Miller, R. XI, Tr. Vol. I, p. 19,11.10-21. Valerie Klaassen met Jacqueline Atherstone. Jacqueline Atherstone told Valerie Klaassen she was a Physician's Assistant with a cardiologist in Wichita. Test. of V. Klaassen, R. XI, Tr. Vol. II, p. 40,11. 17-22.

Cindy Curfman, the girlfriend of Max Miller, Jr. first met Jacqueline Atherstone in October of 2007. At that first meeting Atherstone represented to Cindy Curfman that she was a Physician's Assistant at Galichia Heart Hospital. Test. of C. Curfman, R. XI, Tr. Vol. I, p. 101,11.5-17.

During the last year of the life of Dr. Inghram Miller, Jacqueline Atherstone spent a good portion of her time in California with her mother and significant other, Diane Braun. Dr. Inghram Miller and Atherstone did not see each other very often. When she was in town, maybe an average of once a week. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 42,11.13-22. Atherstone testified she had no secrets from Dr. Inghram Miller about her life in California. She claimed Dr. Inghram Miller was aware of her alternative lifestyle. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 60,11. 1-7.

Hazel Spielman was at Joyce Miller's bedside when she passed away. Joyce Miller asked Hazel Spielman and her husband Glen Spielman to help Inghram. She didn't trust Jacqueline Atherstone. She wanted us to help watch over him and help him and protect him. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 114,11.15-22. On her death bed Joyce Miller advised Glen and Hazel Spielman to protect Dr. Inghram Miller from Jacqueline Atherstone. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 245,11. 11-25.

***10 C. VERACITY OF JACQUELINE ATHERSTONE**

Dr. Inghram Miller experienced anxiety. Jacqueline Atherstone contributed to that anxiety with her false representations and false stories. She had control over him and that created a lot of anxiety for him. Test. of M. Miller, R. XI, Tr. Vol. I, p. 26, 11. 14-25. Dr. Inghram Miller would call Atherstone a Gypsy Gold Digger in conversations with Mike Spangler. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 115, 1 25; p. 116, 11. 1-6. Dr. Inghram Miller told Mike Spangler that he thought Atherstone was after his money. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 116, 11. 7-9. Dr. Inghram Miller told Mike Spangler that Atherstone lied to him. Dr. Inghram Miller told Mike Spangler that Atherstone was a habitual liar. This was said on more than one occasion. Atherstone had told Dr. Inghram Miller that she was a nurse and a CPA. This was false information. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 135, 11. 1-15.

In a telephone conversation with her uncle, Dr. Inghram Miller advised his niece, Annette McLaughlin, among other things, the following:

- a. You can't believe a word Atherstone has to say.
- b. Atherstone had gone back to California and Dr. Inghram Miller did not know what she was doing in California.
- c. Atherstone was very secretive about her California life and sometimes when they would talk on the phone, she would whisper like hidden cameras were watching her and hidden microphones were everywhere so she was not at liberty to talk freely to him.
- d. Dr. Inghram Miller said she was in somewhat of a dangerous situation.

***11** e. Every where she went in California, she drove in a limo.

f. Dr. Inghram Miller thought there was a wealthy family in California and there might have been a Judge involved.

Test. of A. McLaughlin, R. XI, Tr. Vol. I, p. 184, 11. 21-25; p. 185, 11. 1-25; p. 186, 11. 1-11.

Dr. Inghram Miller told Glen Spielman that Jacqueline Atherstone lied all the time. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 250, 11. 9-12. Joyce Miller and Nancy Blankley would talk over the fence as neighbors. Joyce Miller told Nancy Blankley that she did not like Jacqueline Atherstone. She felt she was a gold digger and that there was jewelry lost and some money that was stolen and they thought it was Jacqueline Atherstone. Test. of N. Blankley, R. XI, Tr. Vol. II, p. 110, 11. 15-23.

Dr. Inghram Miller had confided in William Brown that he thought he was being scammed by Jacqueline Atherstone. Test. of W. Brown, R. XI, Tr. Vol. II, p. 187, 11. 4-6. William Brown heard Dr. Inghram Miller refer to Atherstone as a gypsy and pathological liar. Test. of W. Brown, R. XI, Tr. Vol. II, p. 190, 11.20-25; p. 191, 11. 1-7. Dr. Inghram Miller told William Brown that you couldn't believe a word that comes out of the mouth of Atherstone. Test. of W. Brown, R. XI, Tr. Vol. II, p. 194, 11. 18-23. Jacqueline Atherstone told William Brown that a young girl named Corina was allegedly abducted, taken to Oklahoma, raped, left in a field and things just like that. Test. of W. Brown, R. XI, Tr. Vol. II, p. 194, 11. 24-25; p. 195, 11. 1-8.

Jacqueline Atherstone told Glen Spielman about Corina from California. The girl had been abducted and someone found some clothes of hers by a dumpster. These stories drove Dr. Inghram Miller up the wall and Glen Spielman and him were trying to get down to the bottom of the story. After church one Sunday, Dr. Inghram Miller and Glen Spielman *12 drove to Wichita to talk to Atherstone. Atherstone told Dr. Inghram Miller and Glen Spielman she had body guards and detectives watching the place and this and that and the other because of the apparent abduction of Corina. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 241, 11. 5-25; p. 242, 11. 1-12. The Corina story was told by Jacqueline Atherstone to Dr. Inghram Miller and others during the last 60 days of his life. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 242, 11. 23-25; p. 243, 11. 1-6. After Atherstone returned from California on or about September 1, 2009, Dr. Inghram Miller told Mike Spangler that the content of the phone calls from Atherstone had changed. She wanted larger amounts of money. One phone call concerned Corina. Atherstone had called Dr. Inghram Miller and advised him that Corina had been dismembered and found in Wichita. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 122, 11. 21-25; p. 123, 11. 1-25; p. 124, 11. 1-13.

At the hospital, on the day of Dr. Inghram Miller's death (November 1, 2009), Jacqueline Atherstone advised Cindy Curfman that she had a really tough time with her niece that had been living with her but was abducted. She was taking trash out to the curb and some guys abducted her. They had been terrified as to her whereabouts looking for her. They found her buried alive in Oklahoma and then apparently she was okay at that point in time and that, in light of all that, she has been scared for her own life and had to have body guards and slept with a shot gun. Test. of C. Curfman, R. XI, Tr. Vol. I, p. 102, 11. 12-25; p. 103, 11. 1-3.

Jacqueline Atherstone admits she told the stories about Corina being abducted, buried alive, raped, dismembered or words to that effect and they were false. She claims she told the false stories about Corina because she had everybody against her and she just felt if she had something that was a personal tragedy in her life that maybe they'd like her better and *13 give her a little bit of sympathy. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 40, 11. 12-25; p. 41, 11. 1-14.

Towards the end of his life, Dr. Inghram Miller changed his desire to have Atherstone in his life. Dr. Inghram Miller finally realized that the promises were not going to come through and she was not going to take care of him and that he would like to get away from her. Dr. Inghram Miller told Max Miller, Jr. she created a lot of anxiety, a lot of pressure, coercion and that Atherstone was scamming him, she was a fake, she was an imposter and basically a fraudulent charlatan. Test. of M. Miller, R. XI, Tr. Vol. I, p. 28, 1. 25; p. 29, 11. 1-18. In her deposition, Atherstone testified that Dr. Inghram Miller wanted to leave her all of his property because she was very good to him and always there for him and in the end she was the one cleaning up his poop. She admitted that Glen and Hazel Spielman were the ones that were always there for him and that if the motivation was predicated upon that, Glen and Hazel Spielman should have gotten all of his assets. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 81, 11. 22-25; p. 82, 11. 1-25. In her deposition, when asked again why Dr. Inghram Miller would want to leave her all of his assets, Jacqueline Atherstone testified "I don't know." Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 83, 11. 1-6. In her

deposition, after a break and at the very end, Jacqueline Atherstone, on a question from her counsel, "Have you thought of any other reasons that Inghram might have passed his estate to you?" responded that she was the daughter they never had. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 83,11. 7-14.

Dr. Inghram Miller wanted Jacqueline Atherstone to move in with him and be his caretaker. Jacqueline Atherstone knew there was no possible way she could do that. She did not tell Dr. Inghram Miller there was no possible way she could do that. Dr. Inghram Miller *14 through her statements believed she eventually was going to move in and take care of him. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 89, 11. 10-25; p. 90,11. 1-17.

**D. DR. INGHAM MILLER AND JACQUELINE ATHERSTONE AFTER JOYCE
MILLER'S DEATH IN AUGUST 2007 AND PRIOR TO SEPTEMBER 1,2009**

When Joyce Miller was alive, she was always with Dr. Inghram Miller when they visited Ruby and Jacqueline Atherstone. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 20,11. 6-19. When Joyce Miller was alive, Max Miller, Jr. would visit his aunt and uncle approximately once a year around holidays. Test. of M. Miller, R. XI, Tr. Vol. I, p. 16,11.14-18. After Max Miller met his girlfriend, Cindy Curfman in August of 2007, he started spending half of his time in Wichita and half of his time in Breckenridge, Colorado. When he was in Wichita, he would visit his uncle, Dr. Inghram Miller a couple times per week. Test. of M. Miller, R. XI, Tr. Vol. I, p. 16, 11. 14-19; p. 17, 11. 3-22.

After Joyce Miller's death in August of 2007, Jacqueline Atherstone's relationship with Dr. Inghram Miller changed. In her words:

- a. He was very lonely and sad. My mom was passing too. We just kind of watched out for each other.
- b. It was not a romantic relationship.
- c. We were just friends.
- d. There was no sexual activity.

Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 22, 11. 8-25. Jacqueline Atherstone would accompany Dr. Inghram Miller to some of his doctors' appointments. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 23, 11. 13-16.

*15 Jacqueline Atherstone and Dr. Inghram Miller kept a box together which contained deposit slips, expense receipts, banking documents and the like. This box was kept at the residence of Atherstone. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 24,11. 5-25; p. 25,11. 1-17; R. XII, Max Miller Exhibits 22-28. Atherstone's understanding of Dr. Inghram Miller's **financial** contributions to her was that they lived as one, we sort of spent together, we put it in a little pot and it would be our money to go out eat and to do things together. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 25,11. 18-25; p. 26,11. 1-17. Atherstone talked by phone with John Gabrielson, a **financial** advisor for Dr. Inghram Miller, when money was needed to buy Jeeps for Atherstone and Dr. Inghram Miller. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 31, 11. 12-25. Atherstone had a key to the residence of Dr. Inghram Miller. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 103, 11. 24-25.

When Dr. Inghram Miller would mention marriage, Atherstone took it as a joke. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 76,11. 2-25; p. 77,111-20. Atherstone admitted that a marital relationship would be a confidential relationship. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 80, 11. 20-22. Atherstone acknowledged she had a close confidential relationship with Dr. Inghram Miller. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 81,11. 6-8.

Jacqueline Atherstone led Dr. Inghram Miller into believing that eventually she was going to move in with him. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 81, 11. 17-21. Dr. Inghram Miller wanted something that wasn't there. Dr. Inghram Miller

wanted to marry Atherstone. Dr. Inghram Miller had asked his lawyer, William Brown, if he could marry Atherstone and William Brown said no because of the insurance issue or something. R. XI, Test. of M. Spangler, R. XI, Tr. Vol. I, p. 116, 11. 15-24. Dr. Inghram Miller referred to Jacqueline as his girlfriend. This was a fairly often occurrence. Test. of M. Spangler, R. XI, *16 Tr. Vol. I, p. 117, 11. 12-16; p. 138, 11. 1-9; Test. of H. Spielman, R. XI, Tr. Vol. II, p. 115, 11. 5-9.

Mike Spangler would tell Dr. Inghram Miller that Atherstone was a gold digger just after his money. Dr. Inghram Miller would not defend Atherstone as most of the time he would kind of, somewhat, reluctantly agree with Mike Spangler's assessment. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 138, 11. 10-20. Dr. Inghram Miller would call Atherstone a Gypsy Gold Digger in conversations with Mike Spangler. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 115, 1.25; p. 116, 11. 1-6.

After Joyce Miller's death, Annette McLaughlin saw her uncle, Dr. Inghram Miller three or four times. Test. of A. McLaughlin, R. XI, Tr. Vol. I, p. 179, 11. 21-25. Annette McLaughlin (along with her mother, sister and sister's daughter) visited Dr. Inghram Miller in Newton, Kansas. The social visit was pre-arranged and agreed to by Dr. Inghram Miller. When Annette McLaughlin and family arrived, Dr. Inghram Miller was not at home. Glen Spielman, Dr. Inghram Miller's friend, let Annette McLaughlin and the family in to the residence to wait. Dr. Miller and Atherstone showed up a couple hours later. Test. of A. McLaughlin, R. XI, Tr. Vol. I, p. 181, 11. 12-25; p. 182, 11. 1-3. During this visit, Atherstone told Annette McLaughlin about her background. Among other things Atherstone represented to Annette McLaughlin the following:

- a. Atherstone said she lived with her aunt and uncle and their children in California and went out to see them and help them out.
- b. Atherstone said she had a Physician's Assistant degree which she obtained by going to SMU Medical School.
- c. Atherstone's father and brothers were killed in a plane crash.
- *17 d. They were quite wealthy and she went to a private school in Wichita.
- e. She belonged to a country club and was a fairly high society type person.

Annette McLaughlin telephoned Dr. Inghram Miller about these representations after the visit. Dr. Inghram Miller did not know why Atherstone would tell you such things - he said that you can't believe a word she says. Test. of A. McLaughlin, R. XI, Tr. Vol. I, p. 181, 11. 13-25; p. 182, 11. 1-25; p. 183, 11.1-25; p. 184, 11. 1-3.

During the social visit, Dr. Inghram Miller announced that he and Atherstone were going to get married in February of 2009. When Dr. Inghram Miller spoke of marriage, Atherstone shrugged her shoulders like she didn't know anything about it. Test. of A. McLaughlin, R. XI, Tr. Vol. I, p. 184, 11. 4-16. Atherstone and Dr. Inghram Miller would talk by phone daily and their phone calls would end by saying to Dr. Miller, "I love you", and Dr. Miller saying to Jacqueline, "I love you.". Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 43, 11. 12-15; Test. of M. Miller, R. XI, Tr. Vol. I, p. 28, 11. 15-24; Test. of M. Spangler, R. XI, Tr. Vol. I, p. 116, 1. 25; p. 117, 11.1-6; Test. of C. Curfman, R. XI, Tr. Vol. I, p. 103, 11. 7-12. On one occasion when Dr. Inghram Miller advised Glen Spielman he was thinking about marrying Atherstone, Glen Spielman told Dr. Inghram Miller that if he did he would never be around as his friend again. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 249, 11. 18-25; p. 250, 1.1.

E. SEPTEMBER 1,2009 TO NOVEMBER 1, 2009 (DOD)

During the last 60 days of the life of Dr. Inghram Miller, Glen Spielman and his wife, Hazel, would have to stand on each side of Dr. Miller to drag him into a restaurant because he was so out of it. This occurred pretty close to everyday from September 1, 2009 until *18 November 1,2009. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 252, 11. 20-25; p. 253, 11. 7. On the Saturday before Dr. Inghram Miller's death, William Brown took Dr. Inghram Miller's anxiety medication away from him. R. XII, Max Miller Exhibit 6 - Central Home Health Care Records, pp. 32-33. Glen Spielman had several discussions with Jacqueline Atherstone. The discussions included, but were not limited to the following:

a. Glen Spielman was very unhappy the way Jacqueline Atherstone was stringing Dr. Inghram Miller out so he approached her on that.

b. Dr. Inghram Miller was on anti-depressants at the behest of Jacqueline Atherstone. Dr. Inghram Miller could not function. Glen Spielman asked Dr. Inghram Miller why he was taking those meds. Dr. Inghram Miller said Jacqueline had said that they help him.

c. When Glen Spielman and Dr. Inghram Miller went to Jacqueline Atherstone's house in Wichita, Glen Spielman told Jacqueline Atherstone that he was going to get SRS involved because it was not right for anyone to take advantage of an **elderly** gentleman. To this comment, Jacqueline said something about, "You best not do that or I will have to get you fixed up or take care of you."

Test. of G. Spielman, R. XI, Tr. Vol. I, p. 236,11. 2-25; p. 237,11.1-25; p. 238,11. 1-6.

During the last sixty days, Dr. Inghram Miller changed his desire to have Jacqueline Atherstone in his life. Dr. Inghram Miller finally realized that the promises were not going to come through and Atherstone was not going to take care of him and that he would like to get away from her. Dr. Inghram Miller told Max Miller, Jr. she created a lot of anxiety, a lot of pressure, coercion and that Atherstone was scamming him, she was a fake, she was an

***19** imposter and basically a fraudulent charlatan. Test. of M. Miller, R. XI, Tr. Vol. I, p. 28,1. 25; p. 29,11. 1-18. Dr. Inghram Miller told Cindy Curfman he was scared, he wanted to get out of the situation with Atherstone and her drama, he wished he could go away and get out of the horrible situation. Test. of C. Curfman, R. XI, Tr. Vol. I, p. 104,11. 21-25; p. 105,11.1-10.

When Jacqueline Atherstone returned from California on or about September 1,2009, there was a sense of urgency on her part for money. She wanted larger amounts of money. Dr. Inghram Miller expressed to Mike Spangler doubts about whether she even had surgery in California. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 121,11. 7-19. When Atherstone returned from California on or about September 1, 2009, there was an apparent increase in the anxiety of Dr. Inghram Miller. On a scale from 1-10 with 1 being mild anxiety and 10 being a nervous wreck, Dr. Inghram Miller's anxiety level before the return was at 2 or 3 and after she returned it was a 6 to sometimes a 10. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 119,11.9-25.

Part of the source of that anxiety was that he kept talking about the Judge that Jacqueline Atherstone apparently knew in California. Dr. Inghram Miller was scared to death of the Judge. The time his anxiety level was a 10 is the time he called Mike Spangler up in the middle of the afternoon, wanting Mike to come in to see him because Atherstone had called and said they found Corina and she was dismembered and just a horrific story. There was also a beef over whether or not Dr. Inghram Miller was going to give Atherstone money for an outstanding surgery bill in California. Jacqueline Atherstone wanted \$20,000 to pay for the surgery. Dr. Inghram Miller told Mike Spangler that he wasn't going to pay for it. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 120,11. 1-21.

***20** Dr. Inghram Miller would talk about the Judge every time Mike Spangler would talk to him. He thought the Judge was out to harm him and he had Mike Spangler put bars on the back windows of Dr. Inghram Miller's home. This was right before Jacqueline Atherstone came back. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 120,11. 22-25; p. 121,11. 1-6. Dr. Inghram Miller's anxieties during the last 60 days was due in part to the fact he thought someone was trying to kill him. Whether the threat was real or make believe, Dr. Inghram Miller was scared to death of the Judge. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 141,11. 17-23.

Jacqueline Atherstone was angry with Dr. Inghram Miller and threatened him with the Judge who would take care of him. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 115,11. 18-25. At trial Atherstone testified that the Judge was a cousin of her mother's that had passed away many many years ago. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 15,11. 2-7. In her deposition, Jacqueline Atherstone testified that the Judge was just friends of my mom that she knew and that she didn't even know who they are.

Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 15,11. 10-23. With regard to the term Judge, Jacqueline Atherstone testified at trial as follows:

- a. Dr. Inghram Miller and I talked about Ruby's cousin who was the Judge but Dr. Inghram Miller knew he wasn't alive.
- b. She never used the term Judge to threaten Inghram Miller.
- c. She did say the Judge would take care of things because I had a lot of people on my back but there was no Judge to take care of things.
- d. I did say the Judge would take care of things but I never said the Judge would take you out.

***21** Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 16,11. 14-25; p. 17,11.1-13.

After Jacqueline Atherstone returned from California on or about September 1, 2009, Dr. Inghram Miller would sometimes sleep in his car at Mike Spangler's house. Dr. Inghram Miller never slept in his car at Mike Spangler's house prior to Atherstone's return from California on or about September 1, 2009. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 121, 11.20-25; p. 122,1. 1. During the last 60 days of his life, Dr. Inghram Miller would drive out and sleep in his car on the property of Glen Spielman. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 251,11. 6-11.

Dr. Inghram Miller told Hazel Spielman that Jacqueline Atherstone had threatened his life. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 122,11. 15-17. Hazel Spielman heard Atherstone scream at Dr. Inghram Miller on two occasions. On one occasion, Atherstone was so loud Hazel Spielman could hear her through the phone. She was screaming the Judge was going to take care of business. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 120,11. 15-25; p. 121, 11. 1-3.

Nancy Blankley witnessed Jacqueline Atherstone screaming or raising her voice to Dr. Inghram Miller in the back yard. This occurred approximately four or five times. Test. of N. Blankley, R. XI, Tr. Vol. II, p. 100, 11. 20-24. On a scale from one to ten with one being a normal tone of voice and ten being screaming at the top of your lungs, Nancy Blankley rated the screaming of Atherstone at 8. Test. of N. Blankley, R. XI, Tr. Vol. II, p. 111,1.15-20.

Jacqueline Atherstone told Dr. Inghram Miller that he should not talk to Glen and Hazel Spielman about any dealings between her and him or she would have to have him taken care of. Atherstone would mention the Judge. Test. of G. Spielman, R. XI, Tr. Vol. ***22** I, p. 238, 11. 7-19. Dr. Inghram Miller told Hazel Spielman that Atherstone had instructed Dr. Miller that he was not to talk to Glen and Hazel Spielman about the affairs between Dr. Miller and Atherstone. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 117, 11. 12-18.

When Dr. Inghram Miller and Glen Spielman told Jacqueline Atherstone they were going to check out the Corina story, Atherstone became angry and said they shouldn't or the Judge will take care of business. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 119,11. 19-25; p. 120, 11. 1-14. On one occasion after Dr. Inghram Miller hung up the phone with Jacqueline Atherstone he turned to Glen Spielman and said, "Well, you was right.... she wants me dead and her mother dead." Test. of G. Spielman, R. XI, Tr. Vol. I, p. 247, 11. 5-13. Hazel Spielman was present when Dr. Inghram Miller said that Atherstone wanted him and Ruby Atherstone dead. Test. of H. Spielman, R. XI, Tr. Vol. I p. 116,11.24-25; p. 117, II. 1-5.

Jacqueline Atherstone testified she never asked Dr. Inghram Miller for money. He always volunteered to help her. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 43,11.23-25; p. 44,11. 1-20. When Atherstone came back from California on or about September 1, 2009, she claimed she did not ask Dr. Inghram Miller to pay for her surgery bills. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 45, 11.13-15. According to Atherstone, there was no friction between Dr. Inghram Miller and her over the payment of outstanding surgery bills in California. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 45,11. 20-25; p. 46,11. 10-25; p. 47,11.1-25; p. 48,11. 1-12.

F. THE LAST WILL AND TESTAMENT

Max Miller, Jr. was concerned about Dr. Inghram Miller's welfare if he signed over everything to Jacqueline Atherstone in his Last Will and Testament. If that happened, Max *23 Miller, Jr. believed Dr. Inghram Miller's safety would be in jeopardy. Test. of M. Miller, R. XI, Tr. Vol. I, p. 26,11. 4-10. When Max Miller, Jr. became concerned about the physical safety of his uncle, Dr. Inghram Miller, he went to William Brown, the attorney for Dr. Inghram Miller. Max Miller, Jr. told William Brown that this was a dangerous situation. If his uncle signs everything over to Atherstone there's a high likelihood that his life could possibly be in danger. Attorney William Brown responded to Max Miller, Jr. that "Inghram was in good hands" and that "he would take care of him". Test. of M. Miller, R. XI, Tr. Vol. I, p. 30,11. 1-16.

In one telephone conversation about Jacqueline Atherstone, Annette McLaughlin expressed concern for Dr. Inghram Miller's safety. Annette McLaughlin advised Dr. Inghram Miller, if you marry Atherstone and she has something to gain by your demise then you need to watch out. Dr. Inghram Miller told Annette McLaughlin that won't ever happen because I have an iron clad Will that says she would get nothing even if I married her. Annette McLaughlin told Dr. Inghram Miller then you need to make sure she knows that so that she won't have a reason to harm you. Test. of A. McLaughlin, R. XI, Tr. Vol. I, p. 188, II. 11-24. Glen Spielman told Dr. Dr. Inghram Miller he thought it was a very bad choice to change his Will and give Atherstone property as he would be signing his death warrant. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 239,11.9-25; p. 240,11. 8-25. Hazel Spielman was present when her husband told Dr. Inghram Miller if you make Atherstone the beneficiary of your estate, you are signing your death warrant. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 116,11. 5-8.

Jacqueline Atherstone put pressure on Dr. Inghram Miller. She kept asking him to leave all of his property to her. Dr. Inghram Miller would tell Mike Spangler that Atherstone *24 wants me to leave everything to her. She continued to talk to Dr. Miller about it. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 136, 11. 19-25; p. 167, 11. 1-11. During the last 60 days of his life, from on or about September, 2009 to November 1, 2009, every time Atherstone's name would come up in a conversation between Mike Spangler and Dr. Inghram Miller it was always in reference to money or changing his Will. Mike Spangler saw Dr. Inghram Miller three times a week during this time period. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 139,11. 1-15. Mike Spangler was surprised when he found out that Dr. Inghram Miller had changed his Will to leave everything to Atherstone. Dr. Inghram Miller told Mike Spangler this approximately ten days to two weeks prior to the date of his death, November 1, 2009. When Mike Spangler questioned Dr. Inghram Miller why he gave his property to Atherstone in his Will, Dr. Inghram Miller said he "just gave up". Test. of M. Spangler, R. XI, Tr. Vol. I, p. 130, 11. 10-25; p. 131, 11. 1-10.

William Brown drafted the Last Will and Testament of Dr. Inghram Miller that was executed on September 23, 2009. Test. of W. Brown, R. XI, Tr. Vol. II, p. 147, 11. 24-25; p. 148, 11. 1-4; R. XII, Max Miller Exhibit 3. The prior Will of Dr. Inghram Miller was dated September 27, 2007. In that Will, the residence went to Jacqueline Atherstone and the residue went equally to Max Miller, Jr., and his two sisters. Test. of W. Brown, R. XI, Tr. Vol. II, p. 153, 11. 19-25; p. 154, 11. 1-9; R. XII, Max Miller Exhibit 2.

Jacqueline Atherstone was present when the Will was executed. Test. of W. Brown, R. XI, Tr. Vol. II, p. 149, 11. 9-11. Atherstone designated the contingent secondary beneficiary which was her second cousin Anthony Atherstone. Test. of W. Brown, R. XI, Tr. Vol. II, p. 149,11. 12-25; p. 150,11.1-8. William Brown did not know if Dr. Inghram Miller was acquainted with Anthony Atherstone and Dr. Inghram Miller never told William Brown *25 he knew Anthony Atherstone. Test. of W. Brown, R. XI, Tr. Vol. II, p. 150, 11. 12-17. Atherstone also instructed William Brown to remove the power of the executor to sell the house. William Brown changed the Will upon her instruction in this regard. Test. of W. Brown, R. XI, Tr. Vol. II, p. 150, 11.18-25; p. 151, 11. 1-14.

When the Last Will and Testament of Dr. Inghram Miller was executed on September 23, 2009, there were discussions about Dr. Inghram Miller marrying Jacqueline Atherstone. Dr. Inghram Miller and Jacqueline Atherstone were sitting side by side holding hands and Dr. Miller said, "Well should we get married?". William Brown did not think it was a good idea for Dr.

Inghram Miller to marry Jacqueline Atherstone because there were too big of an age difference. Test. of W. Brown, R. XI, Tr. Vol. II, p. 202, 11. 11-25; p. 203, 11.1-9. At the time of the will execution, Atherstone told William Brown she was going to need legal protection from Max in litigation. Test. of W. Brown, R. XI, Tr. Vol. II, p. 151, 11. 15-22. Other than the Last Will and Testament of Dr. Inghram Miller, William Brown never drafted a Last Will and Testament that left all of a decedent's property to a non-family member. Test. of W. Brown, R. XI, Tr. Vol. II, p. 168, 11. 15-23.

The only concern of William Brown in the representation of Dr. Inghram Miller and in the preparation of his Last Will and Testament, was that he had mental capacity to execute a will. Test. of W. Brown, R. XI, Tr. Vol. II, p. 173, 11.6-11. After the Will was executed, and after Jacqueline Atherstone told William Brown that she would need legal protection, William Brown asked Dr. Kathy Pearce to evaluate the mental capacity of Dr. Inghram Miller to make a will. Test. of W. Brown, R. XI, Tr. Vol. II, p. 172, 11. 20-24. William Brown told Dr. Kathy Pearce not to write a report because it just would cause problems. Test. of W. Brown, R. XI, Tr. Vol. II, p. 173, 11. 14-21. William Brown testified that Dr. Kathy *26 Pearce rendered an oral opinion that Dr. Inghram Miller was mentally competent and had the capacity to sign a will. According to Brown, she said on the phone that I gave her enough facts and answered enough of her questions about background that she arrived at that decision. Test. of W. Brown, R. XI, Tr. Vol. II, p. 189, 11. 11-25. In his entire legal career, before this case, William Brown had not referred a client for an evaluation of mental capacity to execute a will. Test. of W. Brown, R. XI, Tr. Vol. II, p. 174, 11. 24-25; p. 175, 11. 1-4.

Prior to the execution of the Last Will and Testament on September 23, 2009, William Brown knew the following about Dr. Inghram Miller:

- a. He had anxiety attacks for many years.
- b. He was taking several prescribed medications a side effect of which can be confusion.
- c. He had [Parkinson's Disease](#).**
- d. He had [high blood pressure](#) a side effect of which is depression.
- e. He was in poor health.
- f. He is 86 years of age.
- g. He had romantic thoughts about Jacqueline Atherstone, a woman 36 years his junior.
- h. He suspected that Jacqueline Atherstone did not have similar feelings about Dr. Inghram Miller.
- i. He had confided in William Brown that he thought he was being scammed by Jacqueline Atherstone.
- j. He heard Dr. Inghram Miller refer to Jacqueline Atherstone as a gypsy and pathological liar.

*27 k. He heard Dr. Inghram Miller tell him that you couldn't believe a word that came out of the mouth of Jacqueline Atherstone.

Test. of W. Brown, R. XI, Tr. Vol. II, p. 183, 11. 10-25; p. 184, 11. 1-25; p. 185, 11. 1-24; 187, 11. 4-6; p. 190, 11. 20-25; p. 191, 11. 1-7; p. 194, 11. 18-23.

William Brown admitted that Jacqueline Atherstone (a) attended the execution of the Will; (b) directed that her second cousin, also unrelated to Dr. Inghram Miller, be named as the secondary beneficiary; (c) objected to the power of the executor to sell the house; (d) directed William Brown to change that provision; (e) received a lot of money from Dr. Inghram Miller; (f) wanted

Dr. Inghram Miller to give her an additional sum of money for the surgery bills. Test. of W. Brown, R. XI, Tr. Vol. II, p. 186, 11. 1-25; p. 187, 11. 1-3. William Brown admits that it is possible that a 83-year-old (sic) male widower who was lonely, suffering from anxiety, on several medications and prescriptions, could fall prey to a manipulative and emotionally **abusive** younger woman. Test. of W. Brown, R. XI, Tr. Vol. II, p. 189, 1. 11. William Brown did nothing to insure that Jacqueline Atherstone was not exerting undue influence over Dr. Inghram Miller because he felt like Dr. Inghram Miller was competent. Test. of W. Brown, R. XI, Tr. Vol. II, p. 188, 11. 15-23.

G. DR. KATHY PEARCE

Dr. Kathy Pearce is a Clinical Psychologist with Prairie View Hospital in Newton. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 70, 11. 3-11. Dr. Kathy Pearce's understanding was that Dr. Inghram Miller was in the process of developing a new Will and there was some concern that family may challenge and they wanted to determine if he had testamentary capacity to do that. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 72, 11. 12-19. Dr. Inghram Miller asked Glen Spielman to accompany him to Kathy Pearce's office. Glen Spielman *28 went into the office with Dr. Inghram Miller for the interview. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 247, 11. 19-25; p. 248, 11. 1-7. Dr. Kathy Pearce met with Dr. Inghram Miller on October 26, 2009, at 4:00 p.m. He was accompanied by a neighbor, Glen Spielman. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 72, 11. 20-25; p. 73, 11. 1-5. Dr. Inghram Miller provided Dr. Kathy Pearce a list of his medications. The drugs he was taking possibly caused side effects such as depression, anxiety, and confusion. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 76, 11. 16-18. Other than a one hour interview on October 26, 2009, Dr. Kathy Pearce did nothing else to determine his mental capacity. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 76, 1.25; p. 77, 11. 1-2. Dr. Kathy Pearce did not prepare a written report. William Brown let her know a few days later that Dr. Miller had passed away and there is no need to complete the evaluation. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 77, 11.4-9.

Dr. Kathy Pearce took three pages of notes. Some of the information on the notes was provided by Dr. Inghram Miller. Other information on the notes are the observations or comments of Dr. Kathy Pearce. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 78, 11. 9-21; R. XII, Max Miller Exhibit 19. When Inghram Miller would respond to a question from Kathy Pearce that was not true, Kathy Pearce would look at Glen Spielman and Glen Spielman would shake his head no if the response of Dr. Inghram Miller was not true. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 248, 11. 8-16. Among other untruths, Dr. Inghram Miller told Kathy Pearce the following:

a. He had a relationship with Jacqueline Atherstone that predated the death of his wife. Upon further questioning, Dr. Miller recanted the date.

*29 b. Jacqueline Atherstone did all of the chores and cleaning around the house.

c. Jacqueline Atherstone and Dr. Inghram Miller had a romantic relationship.

Test. of G. Spielman, R. XI, Tr. Vol. I, p. 248, 11. 8-25; p. 249, 11. 1-14. When Dr. Kathy Pearce asked Dr. Inghram Miller his understanding of why he was there today, Dr. Inghram Miller started talking about stuff that happened in 1959 and providing information that wasn't answering her question. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 80, 11. 14-25; p. 81, 11. 1-4.

The notes of Dr. Kathy Pearce reflect that Dr. Inghram Miller told her that he had three nephews and one niece. In point of fact he has one nephew and two nieces. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 81, 11. 7-16; R. XII, Max Miller Exhibit 19. The notes of Dr. Kathy Pearce reflect that Dr. Inghram Miller told her he changed his Will about a month ago, but it wasn't finalized. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 83, 11. 3-7; R. XII, Max Miller Exhibit 19. The notes of Dr. Kathy Pearce reflect that the old Will contained people he did not want in it and that he wants Bob Puckett and Mike Spangler removed. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 83, 11. 3-21; R. XII, Max Miller Exhibit 19.

The notes of Dr. Kathy Pearce reflect that Dr. Inghram Miller told her that he did not know who the beneficiary of the estate fund would be at that time. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 85, 11. 10-18; R. XII, Max Miller Exhibit 19. The notes of Dr. Kathy Pearce reflect that Dr. Inghram Miller had **paranoid ideations** feeling like other people were out to get him. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 88, 11. 1-9; R. XII, Max Miller *30 Exhibit 19. Since Dr. Kathy Pearce did not complete her examination of Dr. Inghram Miller she could not, at the end of the meeting with Dr. Miller, render a professional opinion as to his mental testamentary capacity. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 89, 11. 4-15.

Dr. Kathy Pearce in her practice has had the opportunity to deal with victims of manipulation, victims of emotional **abuse**, and victims of both emotional **abuse** and manipulation. Sometimes the **elderly** are susceptible to emotional **abuse** and manipulation. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 89, 11. 16-25; p. 90, 11. 1-11. Dr. Kathy Pearce was not asked to determine whether or not Dr. Inghram Miller was the victim of undue influence or coercion or duress pertaining to or regarding the disposition of wealth or property upon his death. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 90, 11. 17-24. If Dr. Kathy Pearce was asked to make a determination as to whether Dr. Inghram Miller was the victim of undue influence or coercion or duress pertaining to the execution of his Will she would have had a lot of other questions to ask Dr. Inghram Miller and she would have interviewed others to make the determination. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 90, 11. 17-25; p. 91, 11. 1-8. When asked if it would be fair to say that an 83 year old male widower who suffered from anxiety and who was taking medication that could make him depressed and confused could fall prey to manipulative, emotional **abusive** younger women, Dr. Kathy Pearce testified it is possible. Test. of Dr. K. Pearce, R. XI, Tr. Vol. II, p. 92, 11. 1-7.

H. THE LAST THREE DAYS

Cindy Curfman was present with her boyfriend, Max Miller, Jr. when they visited Dr. Inghram Miller on Friday, October 30, 2009, two days before his death. Dr. Inghram Miller stated he had not seen Jackie for 7-10 days, that the health nurse had been coming out *31 changing his band-aids or bandages for some infection and was coming out the next day. Because Dr. Inghram Miller had some recent falls, they talked about the possibility of going into an assisted living facility. This was the first time he was ever receptive to that and actually enthusiastic about that. Test. of C. Curfman, R. XI, Tr. Vol. I, p. 104, 11. 8-20. On Friday, October 30, 2009, Max Miller, Jr. visited his uncle, Dr. Inghram Miller around 3 or 4 in the afternoon. They discussed the possibility of getting Dr. Inghram Miller into some sort of assisted living or home care situation. Dr. Inghram Miller realized that it was probably necessary and he warmed up to the idea. Test. of M. Miller, R. XI, Tr. Vol. I, p. 31, 11. 7-15.

On October 31, 2009, the day before he passed, Mike Spangler had conversations with Dr. Inghram Miller about him going into a nursing home. He didn't want to go but he was receptive to the idea that he would go, get better and then come back home. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 131, 11. 20-25; p. 132, 11. 1-10. Max Miller, Jr. visited his uncle, Dr. Inghram Miller, on Saturday, October 31, 2009. They discussed that a social worker was scheduled to come in and see him on Monday to discuss with him his living situation and the possibility of assisted living. Max Miller, Jr. indicated to Dr. Inghram Miller that they can get him in a situation where you don't have to rely on Jacqueline Atherstone anymore. Dr. Inghram Miller was accepting to that notion. Test. of M. Miller, R. XI, Tr. Vol. I, p. 32, 11. 5-17.

Jacqueline Atherstone knew that Dr. Inghram Miller was considering assisted living; that people wanted to put him in a home; that he was very unhappy about it; that there wasn't much choice but assisted living; and that neither she or the Spielman could be there full time to pick him up in the event of a fall. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 95, 11. 4-25; *32 p. 96, 11. 1-4. Hazel Spielman was present when Home Healthcare discussed assisted living. Test. of H. Spielman, R. XI, Tr. Vol. II, p. 117, 11. 19-25; p. 118, 11. 1.

On the morning of November 1, 2009, the date of the death of Dr. Inghram Miller, Dr. Miller telephoned Mike Spangler at 4:00-4:30 a.m. Dr. Miller wasn't tracking quite right. He thought it was light outside and after about 5-10 minutes he came around. For a period of time he thought Spangler had called him and woke him up. After he came around they had a good conversation. After Mike Spangler hung up with Dr. Miller, he called William Brown and told Brown that Dr. Miller wasn't quite tracking and that Brown should check on Miller. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 132, 11. 14-25; p. 133, 11.

1-13; R. XII, Max Miller Exhibit 6 - Central Home Health Care Records. Glen and Hazel Spielman visited Dr. Inghram Miller at approximately 9:30 a.m. on November 1, 2009, and they brought him something to eat. Valerie Klaassen saw Dr. Inghram Miller on the morning of the day of his death, November 1, 2009. He was more alert that day. His only complaint was that he felt a little nauseated. Test. of V. Klaassen, R. XI, Tr. Vol. II, p. 44, 11. 11-25; p. 45, 11. 1-3; R. XII, Max Miller Exhibit 6 - Central Home Health Care Records, pp. 23, 50

Valerie Klaassen arrived around 10:00 a.m. on November 1, 2009. Her work took approximately 30 to 45 minutes. When Valerie Klaassen left, Jacqueline Atherstone was alone with Dr. Inghram Miller. Shortly after Valerie Klaassen left Jacqueline Atherstone called saying Dr. Inghram Miller was in trouble. Test. of V. Klaassen, R. XI, Tr. Vol. II, p. 45, 11. 19-25; R. XII, Max Miller Exhibit 6 - Central Home Health Care Records. After Mike Spangler and his family went to church on the morning of November 1, 2009, they went to the residence of Dr. Inghram Miller. Mike Spangler saw Atherstone's car there so he did not stop. Mike Spangler went on to Walmart. When he was going into Walmart, he saw an *33 ambulance go by. When he got done shopping at Walmart, he came back to Inghram's residence. Atherstone was just leaving. Mike Spangler tried to call Dr. Inghram Miller and there was no answer. It was 30 minutes before Spangler came back to Dr. Inghram's residence after shopping at Walmart. Assuming it was, Atherstone did not go with him to the hospital in the ambulance nor immediately follow him. Test. of M. Spangler, R. XI, Tr. Vol. I, p. 134, 11. 1-25.

Jacqueline Atherstone claims she locked up the house and went to the hospital but was told they needed Dr. Inghram Miller's wallet so she returned to the residence and then returned to the hospital. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 104, 11. 20-25; p. 105, 11. 1-5. At trial Jacqueline Atherstone denied she took the wallet to California. In her deposition, she testified she had the wallet in California since May of 2010 but never looked in it. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 29, 11. 24-25; p. 30, 11. 1-25; p. 31, 11. 1-11.

Pam Roberts, a friend of Atherstone, took her to the hospital after the nurses had called Atherstone on her cell phone to advise they were going to make a decision on Dr. Inghram Miller. This phone call was around 6:54 p.m. in the evening. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 104, 11. 20-25; p. 105, 11. 1-25; p. 106, 11. 1-25; R. XII, Max Miller Exhibit 21 - Cell phone records of Atherstone. In the afternoon on November 1, 2009, Atherstone was at home. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 107, 11. 1-10.

From 11:19 a.m. on November 1, 2009, to 6:54 p.m. on November 1, 2009, the cell phone bills of Jacqueline Atherstone reflect she made approximately 15 phone calls and sent 75 text messages. Atherstone did not make one phone call to the hospital to check on the status of Dr. Inghram Miller. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 107, 11. 11-25; p. 108, 11. 1-7; R. XII, Max Miller Exhibit 21 - Cell phone records of Jacqueline Atherstone.

*34 On November 1, 2009, Max Miller, Jr. received a telephone call from William Brown advising that Dr. Inghram Miller had a stroke and was at St. Francis Hospital in Wichita, Kansas. Max Miller, Jr. picked up his girlfriend, Cindy Curfman, and went to the hospital. They arrived at approximately 5:30 p.m. Jacqueline Atherstone was not present. William Brown was not present. Both arrived later. Test. of M. Miller, R. XI, Tr. Vol. I, p. 35, 11. 19-25; p. 36, 11. 1-16.

Inghram Miller died on November 1, 2009 of a large [subdural hematoma](#) (a/k/a [head injury](#)). R. XII, Max Miller Exhibit 9 - Autopsy Report. There were no comments by anyone including Glen and Hazel Spielman who saw Dr. Inghram Miller in the morning and brought him food; Valerie Klaassen, the registered nurse who checked him out thoroughly minutes earlier; and Jacqueline Atherstone of any [head trauma](#) or [injury](#). His only complaint was that he felt a little nauseated. Test. of V. Klaassen, R. XI, Tr. Vol. II, p. 44, 11. 11-25; p. 45, 11. 1-3; R. XII, Max Miller Exhibit 6 - Central Home Health Care Records, pp. 23, 25.

I. THE SPIRAL NOTEBOOK SUMMER OF 2009 TO DATE OF DEATH

Glen Spielman saw Dr. Inghram Miller write things in his Spiral Notebook after he would talk to Jacqueline Atherstone. This was in the summer of 2009, when Atherstone was in California and upon her return. Dr. Inghram Miller told Glen Spielman that

if something happened to him he really didn't want Atherstone to get hold of his Spiral Notebook. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 246,11. 5-24. Dr. Inghram Miller kept the notebook of questions that he wanted straight forward answers to from Atherstone. When Dr. Inghram Miller would try to push Atherstone for the answers, she would state words to the effect, "if *35 you ask any more questions" I will cut your throat (made by gesture). Test. of M. Spangler, R. XI, Tr. Vol. I, p. 125,11. 2-22.

After the death of Dr. Inghram Miller, Glen Spielman took the Spiral Notebook from Dr. Inghram Miller's residence and gave it to the police. Test. of G. Spielman, R. XI, Tr. Vol. I, p. 246,1. 25; p. 247,11. 1-4. Glen Spielman took the Spiral Notebook to the police because in his mind he could see the possibility of foul play. He is not a brain surgeon nor detective, but thought it was in the best interest probably to take the Spiral Notebook to the police as they might find something useful in it. Test. of G. Spielman, R. XI, Tr. Vol. II, p. 66,11. 1-6.

Jacqueline Atherstone recognized the handwriting in the Spiral Notebook as that of Dr. Inghram Miller. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 57,11. 17-22. With regard to the Spiral Notebook, Dr. Inghram Miller's handwritten notes all pertain to Atherstone. Sometimes he refers to himself as "Inky" his nickname. For the most part, the handwritten notes concern actual events occurring in the lives of Dr. Inghram Miller and Atherstone. Test. of J. Atherstone, R. XI, Tr. Vol. IV, p. 57,11. 17-25; p. 58,11. 1-25; p. 59,11. 1-25; p. 60,11.1-25; p. 61,11.1-25; p. 62,11.1-25; p. 63,11.1-25; p. 64,11. 1-25; p. 65,11.1-25; p. 66, 11. 1-25; p. 67,11. 1-25, p. 68,11. 1-25, p. 69,11. 1-25; p. 70,11. 1-25; p. 71,11. 1-25; p. 72,11. 1-25, p. 73,11. 1-25; p. 75,11. 1-25; p. 76,11. 1-25.

On page 6 of the Spiral Notebook, Dr. Inghram Miller notes "no \$", "I'm practically in a wheelchair", "you are involved with a California family". R. XII, Max Miller Exhibit 20, Spiral Notebook. On page 6 of the Spiral Notebook, Dr. Inghram Miller notes that, "When you get home flowers and chocolate from Gosh, who knows who!" The notes reflect *36 that this is a "secret BOMB - your guy". "Really a GUSHER with money too." "His wife doesn't know." "He is a Dr. too." R. XII. Max Miller Exhibit 20, Spiral Notebook.

With regard to Jacqueline Atherstone's surgery in California, Dr. Inghram Miller notes on page 9 the following:

- a. "What hospital"
- b. "What SURGEON"
- c. "WHAT CITY"
- d. "WHAT SCHEDULE"
- e. "YOU CONCOCTED STORIES NOT TRUE."
- f. "INKY YOU ARE NUTS TO BE TAKEN IN."
- g. "RUN while YOU CAN."
- h. "NOT TO LATE TO FIND A LIVE-IN."
- i. "MAYBE BUY HER A NEW CAR TOO."

R. XII, Max Miller Exhibit 20, Spiral Notebook.

Page 15 of Dr. Miller's Spiral Notebook, he once again questions the situation with Jacqueline Atherstone. Dr. Miller notes:

- a. "MY WAKE UP CALL."
- b. "Time has run out."
- c. "I have been SCAMMED BY YOU."
- d. "You are a FAKE!"
- e. "I have been taken in."
- f. "FOR ME, time for me to move ON."
- g. "No more the hassles of Bluff Avenue. It is a BLUFF."
- *37 h. "No dogs - cats, OR YOUR MOTHER or that CALIFORNIA FIASCO CRAP."
- i. "? I will always WANDER about those "whore" little crotch panties."
- j. "BY = GONE = INKY"
- k. "To MUCH baggage."
- l. "LIES, NO TRUTH."

R. XII, Max Miller Exhibit 20, Spiral Notebook.

On page 17 of Dr. Inghram Miller's Spiral Notebook, he once again questions the source of funds for Jacqueline Atherstone and her veracity. Dr. Miller notes:

- a. "Lots of meals, FOOD, where did you STAY, WHO PAID"
- b. "? GUY - what did you GIVE IN RETURN"
- c. "Insurance PLOY A CROCK"
- e. "DOUBLE SHIT STINKS"
- d. "You can fool SOME OF THE people some of the time BUT NOT all of the people ALL OF THE TIME."
- f. "There are LEAKS in your STORIES."
- g. "I smell SOME DIRTY LAUNDRY"
- h. "THIS MESS WOULD SELL OR SMELL"
- i. "WHO PAID PHONE CALLS TO ME?"

R. XII, Max Miller Exhibit 20, Spiral Notebook.

On page 9 of the Spiral Notebook, Dr. Inghram Miller notes, "NO ME, NO YOU, I GO TO A PEOPLE REST HOME." R. XII, Max Miller Exhibit 20, Spiral Notebook.

*38 IV. ARGUMENT AND AUTHORITY

A. Did the district court err in finding that Jacqueline Atherstone did not exert undue influence upon the decedent when the evidence revealed that Atherstone upon her return from California in September 2009 (i) was in desperate need of money and demanded money from Dr. Miller; (ii) threatened Dr. Miller with his life on a regular basis; (iii) accompanied Dr. Miller to his lawyer's office to get the will changed; (iv) participated in the drafting of the Last Will and Testament; and (v) attempted to sequester the decedent from his friends?

1. Standard of Review

Where the Court made findings of fact as a basis for its conclusions of law, the Appellate Court determines whether the factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the Trial Court's conclusions of law. Substantial evidence is evidence possessing both relevance and substance and furnishing a substantial basis of fact from which the issues can reasonably be resolved. *U.S.D. No. 233 v. Kansas Ass 'n of American Educators*, 275 Kan. 313, 64 P.3d 372 (2003). *City of Wichita v. Public Employees Relations Board*, 259 Kan. 628, 913 P.2d 137 (1996).

2. Trial Court

The trial court found that Jacqueline Atherstone did not exert undue influence upon Dr. Inghram Miller.

3. Law and Argument

Generally, undue influence or fraud, to invalid a will, must amount to coercion, compulsion or constraint, which destroys the testators free agency, and by overcoming his power of resistance obliges him to adopt the will of another instead of exercising his own, and it must be brought to bear directly on the testamentary act. *Estate of Owen R. *39 Robinson v. R. Michael Jennings*, 231 Kan. 300, 644 P.2d 420 (1982). Ordinarily, the burden of proof is on the party claiming undue influence. In Re: *Estate of Car others*, 220 Kan. 437, 552 P.2d 1354 (1976). Undue influence does not consist of mere gratitude for kindness, affection or esteem where a conveyance is induced thereby, nor does it operate in the way of suggestions, entreaties or importunities, short of overpowering the testator's will. *Linn v. Blanton*, 111 Kan. 743, 208 Pac. 616 (1922).

In the proper case undue influence may be inferred because of the confidential or fiduciary relationship between the parties. In such cases the relationship itself implies a condition of superiority of one party over the other. The superior party seeking to uphold the validity of the will has the burden of proof to show that the will represents the testator's free agency. *Nelson Administrator v. Dague*, 194 Kan. 195, 398 P.2d 268 (1965). The term confidential, personal/fiduciary has reference to any relationship with blood, business, friendship or association when one party reposes special trust and confidence in another who is in a position to have and exercise undue influence over the first party. *In the Matter of the Estate Lucille S. Bennett*, 19 Kan. App.2d 154, 865 P.2d 1062 (1993).

The initial burden of proof is upon the challengers to the will. If the challengers prove a fiduciary/personal/confidential relationship and suspicious circumstances exist, then the burden of proof shifts to the proponents of the will to prove by clear and convincing evidence that the will was of the testator's own free will and volition. Whether or not suspicious circumstances exist is a factual issue and decided on a case-by-case basis. In Re: *Estate of Raymond E. Logan v. Bobby Logan and Margie S. Logan*, 23 Kan. App.2d 920, 937 P.2d 967 (1997).

***40** The requirement of independent advice is designed to provide assurance that the aged or infirm or otherwise dependent person confirming the benefit knew what he was doing and doing it of his own free will and act and no undue advantage was taken of him. *Estate of L. W. Werth v. Emil Werth and Victoria Werth*, 207 Kan. 137, 483 P.2d 1053 (1971).

This case reeks with facts supporting undue influence. The last sixty days of Dr. Miller's life from September 1, 2009 to November 1, 2009, were infested with strange occurrences, false representations, threats and lies, all of which placed Dr. Inghram Miller under considerable anxiety and stress. It was not until after Jacqueline Atherstone returned from California on or about September 1, 2009, that the relentless quest was undertaken by her to change the will of Dr. Miller. It was Atherstone's return from California that was the genesis of the problems and threats to Dr. Miller.

Dr. Miller feared for his life. Jacqueline Atherstone had told him that the Judge would take him out. At the request of Dr. Miller, Mike Spangler installed security bars in the back window of Dr. Miller's house just prior to Atherstone's return from California. Dr. Miller thought the Judge was out to harm him. His fear and duress manifests itself in many ways, including the fact that Dr. Miller would drive his car to his friend's house to sleep.

The evidence was clear that Jacqueline Atherstone was coercing and threatening Dr. Miller to change his will. Mike Spangler would see Dr. Miller three times per week. During the last two months of his life every time Atherstone's name came up it was always about her quest for him to change his will or her quest to get more money from him. Virtually, every day during the last sixty days of Dr. Miller life, his primary ***41** caregivers, Glen and Hazel Spielman, would have to stand on each side of Dr. Miller to drag him into a restaurant because he was so out of it. When Atherstone returned from California, Dr. Miller's anxiety levels went from a two or three to a six and sometimes a ten on a scale from one to ten, with one being mild anxiety and ten being extreme anxiety. Atherstone knew of the frail condition of Dr. Miller. Her concocted lies about Corrina would appear to have been calculated to cause Dr. Miller to have a [heart attack](#).

Once Glen Spielman challenged Atherstone's conduct and threatened to turn her into SRS, she threatened Spielman and told Dr. Miller that he was not to talk to his friends anymore about the affairs of Atherstone and Dr. Miller

Jacqueline Atherstone admits that by her words she led Dr. Miller into believing that she was going to move in with him, take care of him, and ultimately marry him. Atherstone testified this was an impossibility, but she did not tell Dr. Miller that it was impossible. To the contrary, she intentionally duped Dr. Miller into believing what she promised would become reality. Atherstone's lies in this regard were calculated to convince Dr. Miller to change his will.

During the last 60 days of his life Dr. Miller himself changed his desire to have Jacqueline Atherstone in his life. His spiral notebook reflects his desire to "run." Most revealing is a notation that reads as follows, "NO ME, NO YOU, I GO TO A PEOPLES REST HOME." The trial court erroneously discounted the significance of the spiral notebook. The spiral notebook was maintained by Dr. Miller in his own handwriting and reflects his feelings and intent. Toward the very end of his life Dr. Miller hung up the telephone from Atherstone and told Glen and Hazel Spielman words to the effect that Glen was right, "She wants me dead and her mother Ruby Atherstone dead." Whether by ***42** threat, beguilement or fraud, Atherstone marshaled the change of the will within 30 days of the date of the death of Dr. Miller to get all of his property. Atherstone exerted undue influence, coercion, duress, and fraud upon Dr. Miller such that the Last Will and Testament dated September 3, 2009, does not contain the testamentary desires of Dr. Miller, but rather those of Jacqueline Atherstone. Atherstone told the decedent that she loved him, was going to move in with him, was going to take care of him and was going to marry him. He trusted and relied that she would care for him for the rest of his life. Atherstone told the decedent that she was a Physician's Assistant and recommended drug changes and the decedent followed her recommendations. He trusted and relied on her recommendations. As stated in Proverbs 7:21-23 (NLT), "So she seduced him with a pretty speech and enticed him with her flattery. He followed her at once, like an ox going to the slaughter. He was like a stag caught in a trap, awaiting the arrow that would pierce its heart. He was like a bird flying into a snare, little knowing it would cost him his life." While the Book of Proverbs is 3,000 years old, the quote seems apropos in this case.

B. Did the district court err in concluding that the relationship between Dr. Inghram Miller and Jacqueline Atherstone was not a confidential relationship when evidence revealed that (i) the decedent and Atherstone lived as one with regard to their money; (ii) Atherstone had a key to his house; (iii) Atherstone telephoned the decedent virtually every day; (iv) Atherstone recommended pharmaceuticals for the decedent; (v) Atherstone accompanied the decedent to his doctor's appointments; (vi) the decedent bought vehicles for Atherstone; (vii) Atherstone kept receipts in a financial ledger on the expenditures of the decedent and Atherstone; and (viii) Atherstone told the decedent that she loved him was going to move in with him and was going to marry him?

***43 1. Standard of Review**

Where the Court made findings of fact as a basis for its conclusions of law, the Appellate Court determines whether the factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the Trial Court's conclusions of law. Substantial evidence is evidence possessing both relevance and substance and furnishing a substantial basis of fact from which the issues can reasonably be resolved. *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 64 P.3d 372 (2003). *City of Wichita v. Public Employees Relations Board*, 259 Kan. 628, 913 P.2d 137 (1996).

2. Trial Court

The court concluded there was no confidential relationship between Dr. Inghram Miller and Jacqueline Atherstone.

3. Law and Argument

There was significant evidence of a confidential relationship. It is clear that the relationship of husband and wife is a confidential relationship. In this case, Dr. Miller was led to believe that he and Jacqueline Atherstone would be husband and wife. Jacqueline Atherstone admits that she had a confidential relationship with Dr. Miller. Dr. Miller referred to her as his girlfriend. He wanted to marry her. He would talk to her by phone everyday and the phone call would end with him saying I love you and her saying I love you.

Atherstone had a key to the residence of Dr. Miller. She would accompany him to some of his doctor's appointments. She testified with regard to financial contributions to her, "They lived as one," "We spent together." According to Atherstone, they kept a box *44 together that was maintained at her residence which had deposit slips, expense receipts, banking documents and the like. Atherstone would dictate what medications and dosage Dr. Miller would take. The confidential relationship appears when the circumstances make it certain that the parties did not deal on equal terms, but, on the one side, there was an overmastering influence or, on the other side, weakness, dependence or trust, justifiably reposed. *Clark Estate*, 461, Pa. 52, 334 A.2d 628 (1975). Generally undue influence being akin to fraud must be proved by clear and convincing evidence. However, that burden of proof can be meant so as to present a prima facie case if the contestant by clear and convincing evidence can prove (i) a confidential relationship; (ii) the confidant receives a bulk of the testator's property; and (iii) suspicious circumstances. Once the contestant has proven the requirements the onus is shifted back to the proponent to demonstrate affirmatively by clear and convincing evidence the absence of undue influence. *Buttons Estate*, 459 Pa. 234, 328 A.2d 480 (1974). The burden of proof should have been upon Jacqueline Atherstone to prove by clear and convincing evidence that there was no undue influence. The trial court erred in concluding there was no confidential relationship between Dr. Miller and Atherstone. The decision of the trial court should be reversed. The burden of proof is upon Atherstone, the proponent of the will. Given the facts of this case, she cannot prove by clear and convincing evidence that the will was not subject to undue influence.

C. Did the district court err in concluding that the decedent had independent advice from persons other than Jacqueline Atherstone in the preparation of his Last Will and Testament when the evidence revealed that the decedent's lawyer, William Brown, (i) allowed Jacqueline Atherstone to participate in the drafting of the will and

dictate certain terms and conditions to be included in the will; (ii) sent the decedent for a mental evaluation some 30 days after the execution *45 of the Last Will and Testament; (iii) knew at the mental evaluation the decedent was confused, did not know his family, and thought he was there to change his will again; (iv) was told by Atherstone the concocted story about the daughter of the significant other being abducted, raped, buried alive and/or dismembered; (v) at one time represented both Jacqueline Atherstone and the decedent; and (vi) did nothing to determine whether or not the decedent was being subjected to undue influence by Jacqueline Atherstone?

1. Standard of Review

Where the Court made findings of fact as a basis for its conclusions of law, the Appellate Court determines whether the factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the Trial Court's conclusions of law. Substantial evidence is evidence possessing both relevance and substance and furnishing a substantial basis of fact from which the issues can reasonably be resolved. *U.S.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 64 P.3d 372 (2003). *City of Wichita v. Public Employees Relations Board*, 259 Kan. 628, 913 P.2d 137 (1996).

2. Trial Court

The trial court concluded that Dr. Inghram Miller had independent advice in the preparation of his will.

3. Law and Argument

There was a plethora of facts suggesting that Dr. Inghram Miller did not have any independent advice in the preparation of his will. That advice certainly did not come from William Brown, the lawyer for Dr. Miller. Jacqueline Atherstone is not a member of Dr. Miller's family. William Brown had not, in his entire career, drafted a Last Will and Testament that left all of a decedent's assets to a non family member. The previous *46 will which stood for two years had Atherstone receiving the residence and the residue going equally to family members. These two facts alone would be cause for a prudent lawyer to ask questions. But there is more. William Brown knew Dr. Miller for 50 years. He was aware he had anxiety attacks more many years. He was aware that Dr. Miller was taking several prescribed medications which could cause confusion. Brown knew Dr. Miller had [Parkinson disease](#). He knew he had [high blood pressure](#) with a side effect of which is depression. William Brown knew that Dr. Miller was 86 years of age and in poor health. He knew Dr. Miller had romantic thoughts about Jacqueline Atherstone, a woman 36 years his junior. Brown suspected that Jacqueline Atherstone did not have similar feelings about Dr. Miller. Dr. Miller confided in Brown that he thought he was being scammed by Atherstone. Dr. Miller would refer to Atherstone as a gypsy and pathological liar. Dr. Miller told Brown that he couldn't believe a word that came out of the mouth of Jacqueline Atherstone.

William Brown did nothing to insure that Jacqueline Atherstone was not exerting undue influence over Dr. Miller. He did not refer Dr. Miller appropriately for a competency evaluation. The time to refer someone for competency evaluation is prior to the changing of the will. In this case William Brown sent Dr. Miller to Dr. Kathy Pearce 30 days after the execution of the will. William Brown knew that Jacqueline Atherstone had just returned from California and was demanding money. With all the red flags William Brown marshaled a new will for Dr. Miller that contained the testamentary desires of Jacqueline Atherstone.

The independent advice in this case needed to come from William Brown. Brown was warned by Max Miller that if he changed Dr. Miller's will to leave everything to *47 Atherstone that Dr. Miller's life would be in jeopardy. Nevertheless, Brown marshaled the change of the will. While his friends and family warned Dr. Miller he was "signing his death warrant" if he changed his will, it was Brown's duty to protect the interest of his client and refuse under the circumstances to change the testamentary documents. The trial court erred in concluding that Dr. Miller had independent advice. The trial court's decision in this regard should be reversed.

D. Did the district court err in discounting the diary of the decedent as merely jotting down the “pros and cons” of his relationship with Atherstone when the diary in the decedent's own handwriting reflects that (i) the decedent had been duped by Atherstone; (ii) it was time for the decedent to run; (iii) if Atherstone was not going to move in with the decedent the decedent was going to assisted living; (iv) Atherstone was an habitual liar and had a secret life in California; (v) Atherstone's stories stunk; and (vi) Atherstone had another man in California?

1. Standard of Review

Where the Court made findings of fact as a basis for its conclusions of law, the Appellate Court determines whether the factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the Trial Court's conclusions of law. Substantial evidence is evidence possessing both relevance and substance and furnishing a substantial basis of fact from which the issues can reasonably be resolved. *US.D. No. 233 v. Kansas Ass'n of American Educators*, 275 Kan. 313, 64 P.3d 372 (2003). *City of Wichita v. Public Employees Relations Board*, 259 Kan. 628, 913 P.2d 137 (1996).

2. Trial Court

The trial court discounted the significance of the spiral notebook by stating, “His notebook set out pros and cons so the relationship that he had with Jacqueline and listed *48 her faults, along with his own perceived faults for not being able to terminate his relationship with Jacqueline.”

3. Law and Argument

Unlike most cases of undue influence we have handwritten notes of Dr. Miller maintained from the summer of 2009 to his last days. The importance of the spiral notebook was lost in the eyes of the trial court. The spiral notebook supports the undeniable fact that Dr. Inghram Miller towards the end was trying to get away from Atherstone. In his own words if there is “no me and no you he was going to a assisted living facility.” Atherstone knew the same things. The spiral notebook corroborates the testimony of Dr. Miller's friends, including Glen and Hazel Spielman, Mike Spangler, Joann Orr, and Nancy Blakely. The spiral notebook is perhaps the single most important document in this case. Its significance was lost on the trial court. Its significance should not be lost on this court.

V. CONCLUSION

As undue influence cases go this one has a myriad of facts and circumstantial evidence that all point to undue influence. Dr. Miller's prior will stood for two years. It wasn't until Atherstone returned from California in September 2009 that the quest began to change the will. The will was changed to leave all of his property to a non family member. The change in the will came at a time when Dr. Miller was “out of it” and being physically supported by Glen and Hazel Spielman when he would go to a restaurant. The change in the will came at a time when Dr. Miller believed his life was threatened by the Judge. Whether the death threats were real or not, they were clearly real in the mind of Dr. Miller. Atherstone participated in the preparation of the will and dictated some its *49 terms. There was a confidential relationship between Miller and Atherstone. There certainly was suspicious circumstances surrounding the execution of the Last Will and Testament. The burden of proof should have been shifted to the proponents of the will. The trial court erred in this regard. The decision of the trial court should be reversed and the purported Last Will and Testament of Dr. Inghram Miller should be struck down and ruled invalid due to the undue influence exerted by Jacqueline Atherstone.